The Transfer of Prisoners in the European Union

Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA

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ISBN 978-94-6236-997-9

http://www.elevenpub.com

ISBN/EAN 978-88-921-8499-2

http://www.giappichelli.it

Sold and distributed
by Eleven International Publishing

P.O. Box 85576
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Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

This book is published in the framework of the project RePers - Mutual Trust and Social Rehabilitation into Practice (GA 766441), funded by the European Union Justice Programme 2014-2020 - www.eurehabilitation.unito.it. The content of this book represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

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Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies

Stefano Montaldo

Abstract: *The chapter focuses on the main fundamental rights challenges posed by Framework Decision 2008/909/JHA. It discusses how fundamental rights concerns have been addressed by the EU legislature and the CJEU thus far, and then applies this approach to the system of cross-border transfers. The analysis firstly addresses the normative and judicial remedies available to resist a forced transfer or challenge the issuing authority's decision to reject the prisoner's request for a transfer. Secondly, the chapter considers whether the risk of facing inhumane or degrading treatment in consequence of a transfer may result in a limit to this judicial cooperation mechanism, also in light of the CJEU case law concerning the European Arrest Warrant.*

Keywords: *Mutual recognition, cross-border transfers, family life, detention conditions, remedies.*

1. *Introduction*

Since the late 1990s, the principles of mutual trust and mutual recognition have acquired increasing importance in the EU legal order and have ultimately become the 'cornerstone of judicial cooperation' across the Union. Accordingly, the Treaty on the European Union (hereinafter, the 'TEU') acknowledges the key role of these principles in both civil and criminal matters and leaves

their specific legal regime to an ever expanding and far-reaching body of EU secondary legislation.

As is known, mutual trust and mutual recognition develop traditional mutual legal assistance mechanisms towards advanced and purely technical cooperation procedures, which increase the role of the political branch and task the national judicial authorities with recognising and enforcing foreign decisions. The golden rule 'recognise and execute' seeks to facilitate judicial cooperation despite and beyond normative differences at domestic level. In fact, the application of a given domestic rule must be accepted even if the legal framework of the executing Member State would have led to a different (procedural or substantive) outcome. More importantly, mutual trust presumes that the foreign judicial decision to be recognised complies with fundamental rights standards, as the legal order from which it stems does.

However, the Court of Justice of the European Union (hereinafter, the 'CJEU') has clarified that this presumption is not absolute, but can be rebutted on a case-by-case basis, in the event of exceptional situations resulting in (the risk of) plain violations of fundamental rights standards. In fact, individual guarantees point out the path to be taken by a judicial cooperation procedure, but can also amount to binding a judicial authority to reject a request for cooperation, since their paramount role is to restrict the exercise of public coercive powers. In this respect, as the practice of the last decade shows, the clash between the effectiveness of EU law and the need to model the European judicial space on respect for the rights of the individual is a recurring concern, cross-sectional to all national judicial decisions covered by EU rules implementing the principle of mutual recognition.

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327, 5.12.2008, pp. 27-46, hereinafter, the 'Framework Decision') is not immune from this scenario, although, surprisingly enough, the fundamental rights challenges it poses have generally been neglected so far, particularly in comparison with the extensive studies on the European Arrest Warrant (hereinafter, 'EAW'). Still, the forced cross-border transfer of a prisoner involves delicate assessments of the inmate's family ties and of the situation he or she is likely to face in the executing State, thereby requiring the judicial authorities involved to take these aspects seriously.

Building on this background, this chapter aims to address the outlined structural effectiveness/fundamental rights dilemma in relation to cross-border transfers of prisoners within the European Union.

Section 2 considers this topic from a normative perspective, analysing how

the EU legislature usually addresses this dilemma by way of secondary legislation concerning the application of the mutual recognition principle to judicial decisions in criminal matters. The chapter then discusses the contribution of the CJEU in striking a balance between effective cooperation mechanisms and appropriate protection of fundamental rights. The chapter provides an outline of the recent and developing case law, mostly focusing on landmark cases concerning the EAW system.

Sections 4 and 5 apply this background to cross-border transfers of prisoners under the Framework Decision. In particular, the former addresses the normative scenario, by pointing out the main fundamental rights challenges posed by this judicial cooperation mechanism, in light of the rehabilitation goal it pursues. It is argued that, even though the prisoner's social rehabilitation cannot be considered to be a fundamental right as such, this elusive notion is an umbrella concept encompassing the right to family life, the prohibition on inhumane and degrading treatment, and the right to liberty. The fifth section discusses whether or not the Framework Decision and the case law of the CJEU establish an adequate set of normative and judicial tools and remedies to prevent or resist an illegitimate forced transfer. As confirmed by current domestic practices on cross-border transfers, the analysis stresses that the peculiar design of this judicial cooperation mechanism risks endorsing a gap in protection, particularly in terms of available effective judicial remedies. Moreover, it is argued that the Framework Decision offers leeway to the issuing judicial authority as regards the decision to commence the cross-border transfer procedure, without counterbalancing this discretionary power through appropriate remedies. [1]

2. *Mutual Trust between Effectiveness and Fundamental Rights Protection: The Normative Approach …*

The EU legislature has only partially taken responsibility for the dilemma between effectiveness and limits to judicial cooperation mechanisms. In order to facilitate and accelerate judicial cooperation, all Directives and Framework Decisions implementing the principle of mutual recognition list the grounds

[1] Of course, this does not mean that all domestic authorities necessarily abuse their powers. On this aspect *see* I. Wieczorek, 'EU Constitutional Limits to the Europeanization of Punishment: A Case Study on Offenders' Rehabilitation', *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue 6, 2018, p. 655. Still, the law is a powerful means for safeguarding those in need of protection and the availability of remedies to address any illegitimate uses of coercive powers is a key aspect in this regard. Some of the best practices identified in the framework of the RePers project are presented in the last chapter of this collection.

for refusing enforcement of a foreign judicial decision. Such limits to cooperation mechanisms are usually optional,[2] whereas only Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, pp. 1-20) also envisages compulsory ones.[3]

The CJEU has provided some general guidelines on the actual scope of these exceptions to the almost absolute duty of recognition. Firstly, it took the stance that they should be interpreted narrowly and in compliance with the general principles of EU law.[4] Secondly, it clarified that the national legislature is entitled to restrict the scope of application of the optional grounds for refusal in the implementing laws, thereby further curtailing the limits to cooperation.[5] Lastly, and most importantly, the Court underlined that the predetermined lists of grounds for refusal are exhaustive. This implies that Member States are prevented from identifying new limits to mutual recognition when implementing EU law. Moreover, the national judicial authorities are not entitled to reject a cooperation request on the basis of either an extensive interpretation of existing exceptions or of an entirely new one, since this departure from the centrally-steered EU pattern would hamper judicial cooperation and foster mutual distrust.[6]

The *ope legis* predetermination of the grounds for refusal has sparked heated debates between practitioners and scholars.[7] As is widely acknowledged, this approach is understandable, as it secures coherence throughout the EU and avoids the risk of a rush to unilateral and uncoordinated initiatives at domestic level, which would affect the European judicial space. Nonetheless, some authors point out that, despite preserving the effectiveness of judicial cooperation procedures and enhancing legal certainty, this normative choice deprives the system of flexibility, as it prevents national judicial authorities from considering different expectations of protection.[8] More specifically, the question

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[2] The Court clarified that the optional nature of these clauses does refer to the implementation of EU law and therefore does not allow national legislators to decide whether or not to transpose them. It is up to the executing judicial authority to decide on their application. Judgment of 21 October 2010 in *Case C-306/09*, *B.*, [2010] ECLI:EU:C:2010:626, para. 52.

[3] Article 3 of Framework Decision 2002/584/JHA.

[4] Judgment of 5 September 2012 in *Case C-42/11*, *Lopes da Silva Jorge*, [2012] ECLI:EU:C:2012:517.

[5] Judgment of 6 October 2009 in *Case C-123/08*, *Dominic Wolzenburg*, [2009] ECLI:EU:C:2009:616.

[6] Judgment of 26 February 2013 in *Case C-399/11*, *Stefano Melloni c. Ministerio Fiscal*, [2013] ECLI:EU:C:2013:107, para. 44.

[7] In general, *see* M. Möstl, 'Preconditions and limits of mutual recognition', *Common Market Law Review*, Vol. 47, Issue 2, 2010, p. 405; S. Montaldo, *I limiti della cooperazione in materia penale nell'Unione europea*, Editoriale Scientifica, Napoli, 2015, pp. 334-429.

[8] On the shift of approach from overreliance on mutual trust to the increasing role of the effectiveness

arises as to whether the exhaustive lists of grounds for refusal fit the purpose of appropriately protecting individual rights.

An overview of the relevant EU legislation demonstrates that most of relevant EU secondary acts do not envisage a general limit to mutual recognition on fundamental rights grounds. Existing provisions touch upon certain selected procedural guarantees and individual rights, such as the right to take part in criminal proceedings or the right to family life, but do not address this topic from an overall perspective. Instead, the opening articles of the Framework Decisions and Directives on mutual recognition usually state that "the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" cannot be affected. This recurring clause merely reflects the inherent hierarchy of the sources of EU law. The Court of Justice has consistently contended that judicial cooperation mechanisms must not result in a violation of the Charter of Fundamental Rights of the European Union, but no clear consequences have ever been attached to the fundamental rights clause under consideration.

The absence of a specific and binding fundamental rights ground for refusal has led some commentators to consider that, at least in the context of the EAW, "hardly any fundamental guarantees of the accused person are ensured". [9] This critical remark perhaps overestimates the legal concept at issue, but highlights a traditional gap in European secondary law in this domain. [10]

The crucial point is that, regardless of the wording of EU secondary law, EU institutions are subject to review regarding their conformity with Treaties and general principles of law, just like Member States when they implement the law of the Union. [11] However, resolving the clash between the quest for effectiveness and human rights protection cannot be left to uncoordinated and, in all likelihood, extremely diversified solutions developed by national judicial

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paradigm, E. Herlin-Karnell, 'From Mutual Trust to Full Effectiveness of EU law: The Years of the European Arrest Warrant', *European Law Review*, 2013, Vol. 38, Issue 1, p. 79.

[9] N.M. Schallmoser, 'The European Arrest Warrant and Fundamental Rights', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22, Issue 2, 2014, p. 135.

[10] None of the acts adopted in this domain qualifies the protection of fundamental rights as a reason for rejecting a request for cooperation, with the exceptions of Article 11 of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, pp. 1-36), and Article 19, let. h) of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018, pp. 1-38).

[11] Judgment of 3 May 2007 in *Case C-303/05*, *Advocaten voor de Wereld*, [2007] ECLI:EU:C:2007:261, para. 45. On the post-Lisbon approach of the Court, *see* K. Lenaerts & J.A. Gutiérrez Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law', in V. Mitsilegas, M. Bergström & T. Konstadinides (Eds), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, Cheltenham, 2016, p. 15.

authorities. Therefore, the Court of Justice has been called upon to provide common interpretative guidance, with a view to striking a clearer balance between these opposing driving forces.

3. … *And the Case Law of the Court of Justice*

The CJEU has contributed to bridging the gap of fundamental rights protection in a series of preliminary rulings on the EAW system. Admittedly, due to the varied peculiarities of the judicial decisions covered by EU rules implementing the principle of mutual recognition, such case law cannot be uncritically replicated for any branch of judicial cooperation in criminal matters in its entirety. Nonetheless, the success of the EAW – and the ensuing significant body of jurisprudence, by now much more considerable and meaningful compared to any other mutual recognition instrument – has triggered interpretative solutions and clarifications worthy of attention in any branch of judicial cooperation in criminal matters. This section provides an essential overview of some key stages of the evolution of the Court's approach, to pave the way for a closer analysis of the case of cross-border transfers.

At the outset of a developing line of cases on Framework Decision 2002/584/JHA, the CJEU clearly considered the effective conduct of judicial cooperation mechanisms to be the overarching priority of its legal reasoning.[12] In *Melloni*, it emphasised that the exhaustive nature of the list of grounds for refusal prevents States from opposing judicial cooperation by invoking higher standards of protection of an individual right than the levels set by the Charter.[13] In such cases, more extensive protection equates to an undue restriction of the primacy of EU law and the functioning of judicial cooperation. In addition, in *Radu*, the Court contended that the executing judicial authorities could not refuse to give effect to an EAW on grounds that the requested person had not been heard before that EAW was issued. A similar situation does not feature among the grounds for non-execution and cannot be derived from the wording of Articles 47 and 48 of the Charter.[14] On the other hand, an obligation for judicial authorities to hear the requested person before an EAW was issued would "inevitably lead to the failure of the very system of surrender".[15] This would undermine the "certain element of surprise" of the procedure, which is essential for

[12] S. Rodin, 'Useful Effect of the Framework Decision on the European Arrest Warrant', *Il Diritto dell'Unione europea*, Vol. 32, Issue 1, 2016, p. 1.

[13] *Case C-399/11*, *Stefano Melloni c. Ministerio Fiscal*, para. 103.

[14] Judgment of 29 January 2013 in *case C-396/11*, *Ciprian Vasile Radu*, [2013] ECLI:EU:C:2013:39.

[15] *Case C-396/11*, *Ciprian Vasile Radu*, para. 39.

stopping the person concerned from taking flight, as a side effect of the freedom of movement. [16]

Legal scholars have critically appraised this approach. The Court has been considered evidently less concerned with protecting the fundamental rights of individuals granted by primary law than with safeguarding the intention of governments, when they passed the secondary legislation. [17] Moreover, undisputed reliance on effectiveness would hamper more strategic objectives, such as strengthening the chances of the offenders' future rehabilitation, as an integral part of human dignity. [18] Other scholars have highlighted a lack of institutional empathy on the part of the Court of Justice. [19]

This scenario began to change in the aftermath of the *NS* case, [20] where the Court underlined that EU law precludes the application of a conclusive presumption that the Member State responsible for an asylum application complies with fundamental rights. Even though the (then) Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, pp. 1-10) established automatic criteria for determining the Member State responsible for an asylum application, the Court rejected the idea of an entirely blind application of such requirements. In fact, the duty to interpret secondary law in light of the Charter binds the national authorities to perform a preliminary check on whether the Member State of destination ensures an appropriate level of protection of fundamental rights. Consequently, an asylum seeker cannot be transferred to the formally competent Member State if systemic deficiencies affecting the management of the asylum procedure and reception conditions amount to substantial grounds for believing that the person involved would face a real risk of being subjected to inhumane or degrading treatment. [21]

By analogy, questions arose as to whether or not and to what extent the

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[16] Judgment of 27 May 2014 in *Case C-129/14 PPU*, *Zoran Spasic*, [2014] ECLI:EU:C:2014:586, para. 63-65.

[17] L. Besselink, 'The parameters of constitutional conflict after Melloni', *European Law Review*, Vol. 39, Issue 4, 2014, p. 551.

[18] P. Mengozzi, 'La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana', *Studi sull'integrazione europea*, Vol. 9, Issue 2, 2014, p. 225.

[19] P. Martín Rodríguez, 'Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero dl 2013, Stefano Melloni', *Revista general de derecho europeo*, Vol. 30, 2013, p. 34.

[20] Judgment of 21 December 2011 in *Joined Cases C-411/10 and C-493/10*, *NS*, [2011], ECLI:EU:C:2011:865.

[21] *Joined Cases C-411/10 and C-493/10*, para. 94-100.

Charter imposes similar obligations in the field of judicial cooperation, where mutual recognition of the foreign decision would lead to a manifest breach of fundamental rights.

The Court was soon challenged with these concerns in *Lanigan*,[22] a case concerning the failure on the part of an Irish executing authority to respect the time limits for the adoption of a decision on the execution of an EAW (Article 17 of Framework Decision 2002/584/JHA). The referring Court asked whether such a situation could prevent the holding of the requested person in custody and eventually neutralise the duty to execute the EAW, by virtue of the right to liberty (Article 6 of the Charter). The Court considered that keeping a suspect in custody is precluded only insofar as the duration of the procedure is excessive in relation to the characteristics of the case and the procedure itself has been carried out in a sufficiently diligent manner. However, the duty to enforce the foreign judicial decision persists.[23] If the national authority decides to bring the requested person's custody to an end, it is consequently required to attach any measures it deems necessary to the provisional release so as to prevent him from absconding and to ensure that the material conditions for his effective surrender remain fulfilled for as long as no final decision on the execution has been taken.[24] The Court's findings set a clear dividing line: fundamental rights significantly influence the management of the procedure in the executing Member State, but they do not mark a plain departure from the golden rule 'recognise and execute', leading to a mere postponement of enforcement of a cooperation request.

In developing these premises, the Court made a step forward in its seminal judgments *Aranyosi and Căldăraru* and *Celmer*.[25] The first case dealt with the EAW system and the risk for the requested person of facing inhumane or degrading detention treatment in a detention facility in the issuing State. The Court followed on opinion 2/13 and *NS*,[26] to confirm that mutual trust does not mean blind trust,[27] as the duty to recognise and execute a

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[22] Judgment of 16 July 2015 in *Case C-237/15 PPU*, *Lanigan*, [2015] ECLI:EU:C:2015:474.

[23] *Case C-237/15 PPU*, *Lanigan*, para. 37 and 40.

[24] *Case C-237/15 PPU*, *Lanigan*, para. 59 and 63.

[25] Judgment of 5 April 2016 in *Joined Cases C-404/15 and C-659/15 PPU*, *Pál Aranyosi and Robert Căldăraru*, [2018] ECLI:EU:C:2016:198; judgment of 25 July 2018 in *Case C-216/18 PPU*, *LM (deficiencies in the system of justice)*, also known as *Celmer*, [2018] ECLI:EU:C:2018:586.

[26] *Opinion 2/13* of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454, para. 191; *Joined Cases C-411/10 and C-493/10*, *NS*, para. 78-80 and para. 94.

[27] K. Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust', *Common Market Law Review*, Vol. 54, Issue 4, 2017, p. 805.

foreign judgment cannot always justify the overruling of fundamental rights.[28] More precisely,[29] the executing judicial authorities must take into due consideration the presence of reliable and up to date evidence demonstrating a structural deficiency of the penitentiary system in the issuing State, amounting to a widespread and real risk of violation of the prohibition on inhumane and degrading treatment enshrined in Article 4 of the Charter. If such a systemic flaw is detected, the executing judicial authority must make a second, more specific and individual assessment, as it has a duty to verify whether the person concerned would personally face such a risk of violation upon surrender to the requesting State. If so, the authority involved should request reassurances on the compatibility of the penitentiary regime and of the personal situation to be faced by the person concerned, in the event of surrender, with fundamental rights standards. In fact, the Court stressed that priority should be given to the remedies provided by the EAW system itself. Namely, the possibility of prior consultations between the judicial authorities involved (Article 15(2) and (3) of Framework Decision 2002/584/JHA) is a preliminary way of seeking a solution to secure both the enforcement of the foreign decision and the rights of the person concerned. In any event, should the reassurances be inadequate and/or body of information collected be conclusive regarding the serious and actual risks for the person involved, the executing judicial authority is compelled to postpone the surrender. As a last resort, if the situation ultimately does not improve and no alternatives are found, the execution of the EAW must be abandoned.[30]

In its subsequent case law, the Court of Justice further clarified the scope of this individual assessment.[31] Firstly, if a systemic deficiency exists, the mere availability of a judicial remedy for challenging the detention conditions does not rule out the real risk of inhumane and degrading treatment.[32] Second-

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[28] S. Montaldo, 'On a Collision Course! Mutual Recognition. Mutual Trust and the Protection of Fundamental Rights in the Recent Case Law of the Court of Justice', *European Papers*, Vol. 1, Issue 3, 2016, p. 984.

[29] The test is explained in *Joined Cases C-404/15 and C-659/15 PPU*, *Pál Aranyosi and Robert Căldăraru*, para. 88-104.

[30] For a commentary on the test and on its possible developments *see*, *inter alia*, S. Gáspár-Szilágy, 'Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and New Grounds for Postponing a European Arrest Warrant', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 24, Issue 2, 2016, p. 197.

[31] Judgment of 25 July 2018, in *Case C-220/18 PPU*, *ML (detention conditions in Hungary)*, [2018] ECLI:EU:C:2018:589.

[32] *Ibidem*, para. 74 and 75. This has been more recently confirmed by judgment of 15 October 2019, in *Case C-128/18, Dorobantu*, [2019] ECLI:EU:C:2019:857, para. 81. The same applies in case of adoption in the issuing Member State of measures, such as the establishment of an ombudsman

ly, the executing judicial authority is required to assess only the detention conditions in prisons in which, according to the available information, it is likely that that person will be detained, including on a temporary or transitional basis.[33] Moreover, this evaluation must be confined to the actual and precise detention conditions which are relevant for determining a breach of the Charter in the specific case at issue, for instance, in view of the inmate's physical and mental condition.[34]

Elaborating on this background, the *Celmer* case offered the Court of Justice the opportunity to expand the scope of this two-layered test to the (serious risk of a) plain violation of a pillar of the rule of law, namely the independence and impartiality of the judiciary in the issuing Member State, ultimately affecting the right to a fair trial enshrined in Article 47(2) of the Charter. On that occasion, the Court was confronted with the recent reforms of the Polish judiciary and reiterated *mutatis mutandis* the subsequent and intertwined phases of this assessment. Firstly, as far as the identification of a systemic deficiency is concerned, it acknowledged that the executing authority can be satisfied with the issue of a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TFEU, detecting a real risk of breach of the right to a fair trial, on account of structural or generalised flaws with regard to the independence of the judiciary. Secondly, it stated that the executing authority must determine, specifically and precisely, whether the situation of the person concerned, the nature of the offence for which he or she is being prosecuted, and the factual context that forms the basis of the EAW converge to demonstrate that there are substantial grounds for believing that he or she will run the outlined serious risk.

While further clarifications are likely to be provided by the Court – for instance in relation to the possibility of extending the *Aranyosi and Căldăraru* test to other violations involving non-absolute fundamental rights – this developing case law has shed some light on possibly resolving the dilemma on effectiveness/fundamental rights protection. For the purposes of this chapter, the crucial point is whether the stance taken by the CJEU could contribute to some extent to addressing the fundamental rights challenges posed by the Framework Decision.

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system or establishment of courts of enforcement of penalties, which are intended to reinforce the monitoring of detention conditions in that Member State.

[33] *Case C-220/18 PPU*, *ML (detention conditions in Hungary)*, para. 84-87.

[34] *Ibidem*, para. 94. See also *Case C-128/18, Dorobantu*, where the Court has clarified that, in the absence of comon EU standards on dignified detention, the minimum requirements laid down by the European Court of Human Rights under Art. 3 of the Convention should be considered.

4. *The Case of Cross-Border Transfers of Prisoners: Social Rehabilitation and Human Rights Challenges*

From a normative perspective, Framework Decision 2008/909/JHA does not differ from the scenario outlined above. In fact, it reiterates most of the optional grounds for refusal envisaged in other Directives and Framework Decisions and makes some general references to the obligation to protect fundamental rights, whereas the violation of the Charter does not formally amount to preventing mutual recognition of a foreign sentence. In particular, Article 3(4) reiterates the generic and introductory human rights clause which can be found in all EU secondary law instruments implementing the principle of mutual trust in criminal matters. In particular, this paragraph states that the Framework Decision "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU". The Preamble of the Framework Decision complements this provision. Recital 13 confirms that cross-border transfers must comply with the Charter, and more specifically with its Chapter VI. In addition, Recitals 5 and 14 refer to procedural guarantees and due process rights, as key components of the principle of mutual confidence between national judicial authorities, whereas Recital 15 states that the Framework Decision should affect the right of EU citizens to move freely in the European territory. The second part of Recital 13 clarifies that the Framework Decision should be interpreted as allowing

> refusal to execute a decision when there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced on any one of those grounds.

Lastly, compared to Framework Decision 2002/584/JHA, Framework Decision 2008/909/JHA does not provide any clear remedy in the event of exceptional situations affecting the person concerned. For instance, Article 23(4) of Framework Decision 2002/584/JHA allows for the postponement of surrender "for serious humanitarian reasons", particularly where there are substantial grounds for believing that it would clearly endanger the requested person's life or health. Moreover, the Preamble, at Recital 10, emphasises that the whole mechanism of the EAW may be (exceptionally) suspended only in the event of a serious and persistent breach of the founding European values and principles set out in Article 2 TEU, determined by the Council pursuant to Article 7(2) TEU.[35]

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[35] This limit to judicial cooperation is in any case dependent upon the outcomes of the political

Still, the act under consideration encroaches upon the key provisions of the Charter, and the increasing number of cross-border transfers requires further reflection on compliance with fundamental rights standards.

From this point of view, it must be borne in mind that the system established by the Framework Decision is intended to enhance the social rehabilitation opportunities of the prisoners concerned (Article 3(1)). In an EU-wide judicial space where people move freely, prisoner transfers contribute to preventing loopholes stemming from the territoriality of criminal law and its enforcement. In fact, the identification of the family/social/cultural centre of gravity of a given offender and the possibility of allocating enforcement accordingly, in principle, provides increased opportunities for choosing the best place for serving a deprivation of liberty, with a view to enhancing the post-release reinsertion into society and preventing reoffending. Admittedly, a closer look at the practice of the Member States reveals a divide between the law on paper and domestic approaches in this domain. An increasing body of scholarly analyses highlights that Member States are often more concerned with disposing of undesired EU citizens rather than pursuing the primary goal of this judicial cooperation mechanism.[36] The alternative drivers to cross-border transfers range from deflating prison overcrowding to minimising the budgetary burden of prison systems to general public order concerns, but in the end they all elude *de facto* the rationale of the Framework Decision.

The Court of Justice has not yet had the opportunity of taking a clear stance on this trend. In a handful of cases regarding other judicial cooperation instruments, free movement of persons, EU citizenship and extradition law, the CJEU has acknowledged that the offender's rehabilitation "in the State in which [the person is or] has become genuinely integrated is not only in his interest but also in that of the European Union in general".[37] However, this EU-wide interest needs to be balanced with competing policy objectives, and the consequences of a frustration of the rehabilitation goal are still unclear from an EU law perspective. At the same time, the stance taken by the Court infers that social rehabilitation as such, for the purposes of the European legal order,

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remedy under Article 7 TEU, whose effectiveness is a matter of debate, in light of the recent practice of EU institutions.

[36] *See*, for instance, V. Mitsilegas, 'The Third Wave of Third Pillar Law', *European Law Review*, Vol. 34, Issue 3, 2009, p. 523, and A. Martufi, 'Assessing the Resilience of 'Social Rehabilitation' as a Rationale for Transfer: A Commentary on the Aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law*, Vol. 9, Issue 1, 2018, p. 49.

[37] *Inter alia*, Judgment of 17 April 2018 in *Joined Cases C-316/16 and C-424/16*, *IB and Vomero*, [2018] ECLI:EU:C:2018:256, para. 75, judgment of 23 November 2010 in *Case C-145/09*, *Panagiotis Tsakouridis*, [2010] ECLI:EU:C:2010:708, para. 50. Also S. Montaldo, 'Offenders' Rehabilitation: Towards a New Paradigm for European Criminal Law', *European Criminal Law Review*, Vol. 8, Issue 2, 2018, p. 223.

does not amount to an autonomous fundamental right deserving protection in court. Consequently, two key points arise in relation to cross-border transfers, namely which rights are actually at stake and which normative and judicial remedies could achieve the aim of the Framework Decision and the individual guarantees underpinning it.

These questions are actually in line with the case law of the European Court of Human Rights (hereinafter, the 'ECtHR'), which rejects the idea of a fundamental right to be – or not to be – transferred. The Strasbourg Court has consistently contended that a forced transfer serving other purposes than social rehabilitation does not amount *per se* to a violation of the Convention.[38] Instead, the main concern is whether a violation of a fundamental right occurs during the transfer or as a result of it. In fact, the ECtHR describes social rehabilitation as an ongoing progression from the early days of the sentence to the preparation for release or, in general, to life after punishment.[39] As such, the Strasbourg Court conceptualises offenders' rehabilitation as an obligation of means incumbent upon the national authorities. The latter have the duty to take all reasonable measures to enhance an inmate's re-socialisation path. Still, the ECtHR has consistently held that this obligation "is to be interpreted in such a way as not to impose an excessive burden on national authorities" and that the domestic authorities enjoy significant discretion as to the actual choice of such means.[40]

Therefore, social rehabilitation calls for an appropriate normative, administrative and judicial environment, especially in a cross-border scenario, but, according to its interpretation by the ECtHR, it does not seem to be, as such, a conclusive argument for placing constraints on mutual recognition.

At the same time, social rehabilitation is an umbrella concept, which implies codified fundamental rights. Besides the procedural guarantees inherent to the enforcement of a sentence in the framework of the criminal execution phase, the right to family life, the ban on inhumane and degrading treatment, and the right to liberty play a prominent role in this domain.[41] These rights are enshrined both in the Charter and in the ECHR. Moreover, they all meet the conditions for being considered equivalent for the purposes of Article 52(3) of the Charter itself. This means that, in principle, the case law of the ECtHR is of particular

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[38] C. Grabenwater, *The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Commentary*, Hart Publishing, Oxford, 2014, p. 60, and case law referred to therein.

[39] *Dickson v. United Kingdom*, ECHR (2007), ECLI:CE:ECHR:2007:1204JUD004436204.

[40] *Murray v. The Netherlands*, ECHR (2016), ECLI:CE:ECHR:2016:0426JUD001051110.

[41] A. Martufi, 'The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?', *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue 6, 2018, p. 1; L. Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law', *Common Market Law Review*, Vol. 56, Issue 1, 2019, p. 61.

significance in defining the scope of the relevant provisions of the Charter, which must be interpreted in a manner consistent with the Convention.

In this respect, regardless of the conceptual essence of the notion of offenders' rehabilitation, the analysis of the practice developed during the RePers project demonstrates that the formal link established by the Framework Decision between this concept and prisoner transfers often conceals the managerial ambitions of Member States on intra-EU mobility for hidden public order and budgetary purposes. The absence of effective limits within the Framework Decision on the risk of abusive practices calls for more stringent remedies against the (risk of) a violation of prisoners' rights, and, in particular, of the provisions of the Charter contributing to defining the scope of the notion of offenders' social rehabilitation. The next section discusses the tools and remedies available to the judicial authorities involved and the person concerned for avoiding or tackling cross-border transfers resulting in a (risk of) violation of these rights.

5. *Resisting Mutual Recognition: Remedies against Transfers Resulting in Violations of Fundamental Rights*

5.1. *The Normative Layer: Preventing Illegitimate Transfers through the Judicial Cooperation Mechanism Designed by Framework Decision 2008/909/JHA*

The horizontal cooperation mechanism designed by the Framework Decision maximises the role of the judicial authorities involved, whereas it restricts the prisoner's intervention to a minimum, basically through the possibility of providing a personal opinion and, in limited cases, of conditioning the transfer upon his or her consent. Accordingly, the only tools for avoiding an undue transfer before a decision on recognition is taken refer to the bilateral relationship between the judicial authorities involved.

Article 4(2) of the Framework Decision clarifies that the issuing authority is entitled to forward a certificate and the related judgment only insofar as it "is satisfied that the enforcement of the sentence by the executing Member State would serve the purpose of facilitating the social rehabilitation of the sentenced person". Appropriate preliminary consultations between the competent domestic authorities should take place for this purpose. Furthermore, from the other side of the cooperation mechanisms, Article 4(4) allows the executing judicial authority to provide the issuing one with a "reasoned opinion" pointing out that enforcement in the Member State of destination would not facilitate the successful reintegration of the sentenced person into society.

Therefore, the Framework Decision, in principle, urges the Member States to adopt appropriate measures to form the basis on which their national judicial authorities will decide on the forwarding of a transfer request. However, it does not provide any additional guidance on the precise scope and significance of the rationale underpinning the judicial cooperation mechanism at stake, thereby leaving leeway for transposition and judicial practices at national level. Some useful hints can be taken from Recital 9, which indicates a non-binding list of possible criteria to be considered by the competent authorities, namely "the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State". More substantial reference points could also be derived from the case law of the ECtHR and of the Court of Justice concerning the rights covered by the umbrella concept of social rehabilitation, namely the right to family life, the right to liberty, and the ban on inhumane and degrading treatment, briefly recalled in the previous paragraph. In fact, the content – and the ensuing need for protection – of these rights offer to the issuing authority a reliable parameter through which the preliminary assessment urged by Article 4(2) could be legitimised.

With regard to the right to family life, as confirmed by the relevant literature and the RePers project activities,[42] family links, in practice, feature highly among the drivers for a cross-border transfer. Even though no conclusive presumptions can be upheld, the existence of personal connections – even informal, such as a non-registered partnership – in the executing State and, conversely, the absence of such a familial environment in the issuing State are generally considered a sound justification for a forced removal. Accordingly, the ECtHR has repeatedly underlined the importance of preserving contacts with the outside world and family ties for the purposes of the prisoner's engagement in an empowerment process in view of his or her release.[43] Nonetheless, a closer look at the practice of the judicial authorities reveals that the analysis of this aspect is quite poor, both in terms of the collection of appropriate evidence and of the assessment of the overall situation of the prisoner involved.

It should also be considered that the CJEU has interpreted the right to family life narrowly in other areas of judicial cooperation in criminal matters. Again, the case of the EAW system is particularly illustrative. Article 4(6) of

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[42] *See* the national reports included in T. Marguery, *Mutual Trust Under Pressure, the Transferring of Sentenced Persons in the EU: Transfer of Judgments of Conviction in the European Union and the Respect for Individual's Fundamental Rights*, Wolf Legal Publishers, Tilburg, 2018.

[43] *Dickson v. United Kingdom*, ECHR (2007).

Framework Decision 2002/584/JHA envisages an optional ground for refusal of surrender "where the requested person is staying in, or is a national or a resident of the executing Member State". Consistent case law of the Court of Justice upholds that this statement aims to safeguard the requested person's societal environment, which any execution of an EAW would be likely to disrupt. The rationale is that the person concerned could have settled in the executing Member State, where he or she might work on a stable basis and might have established a solid network of personal relations, including family links. On the one hand, the Court has accepted that this environment facilitates rehabilitation from an individual perspective and also contributes to preventing reoffending, to the benefit of the hosting society as a whole. On the other hand, however, the CJEU itself has interpreted this provision narrowly, thereby further favouring mutual recognition and the principle of effectiveness in comparison to the right to family life. The *Wolzemburg* case is particularly insightful in this regard, as, on that occasion, a Dutch law conditioning the possibility of invoking Article 4(6) of Framework Decision 2002/584/JHA on a prior and continuous period of presence in the territory of the host Member State of no less than 5 years was deemed to introduce a proportionate limit to the right at issue, due to the need to enhance the advanced system of surrender established by the EAW. [44]

Detention conditions – in particular those to which the prisoner will be subject in the Member State of destination – pose further challenges to the achievement of the purpose of Framework Decision 2008/909/JHA. Again, the law on paper and the law in action do not entirely tally. In principle, appropriate treatment in prison, covering both adequate detention conditions and the possibility of engaging in a varied set of rehabilitation activities and programmes, is considered a key component of the gradual preparation for post-release return to society. Poor – where not degrading – detention conditions raise particular criticisms in a cross-border scenario. Firstly, the prisoner usually has very limited information on the treatment he or she will receive in the executing State. Secondly, he or she might be forced to interrupt an ongoing rehabilitation programme in the issuing State abruptly, having no access to equivalent or appropriate measures after the transfer has been performed. Nonetheless, a prisoner could be willing to face such a scenario, if – for instance – he or she may benefit from a reduced sentence pursuant to the law of the executing Member State. The same applies to the choice between detention conditions and proximity to family.

In this context, additional concerns derive from the right to liberty, under Article 6 of the Charter, in relation to which the case law of the ECtHR and of

[44] *Case C-123/08*, *Dominic Wolzenburg*.

the CJEU converge to identify emerging protection requirements. The ECtHR has developed a test to verify whether domestic law and practices in the field of extradition and pre-removal detention lead to an arbitrary restriction of this right.[45] Some elements of this test are particularly significant for cross-border transfers pursuant to the Framework Decision and can be further developed in light of the recent case law of the Court of Justice.[46] More specifically, the ECtHR attaches importance to the appropriateness of the locations and material conditions of detention. In *Al Chodor*,[47] a recent case concerning the deprivation of liberty of asylum seekers, the Court of Justice complemented this approach, by pointing out that the protection against arbitrary restrictions of personal liberty also requires the detention to be based on a clear, predictable and accessible legal basis. Even before considering the material detention conditions, both the grounds and the procedures for deprivation of liberty should therefore be accessible and foreseeable, to avoid undue departures from Article 6 of the Charter. To provide an example, *Al Chodor* referred to domestic laws allowing for varied forms of detention of asylum seekers on generic grounds, such as the undetermined risk of absconding. Article 6 of the Charter requires this risk to be further clarified and defined through norms of general application outlining the criteria for believing that the person involved is likely to abscond. Otherwise, the relevant national law would blur the boundaries of a legitimate and proportionate deprivation of liberty, eventually offering leeway to the competent authorities for broadening the scope of their coercive powers.

This case law reinforces the importance of detention conditions – and of the related legal frameworks and institutional practices – in the framework of cross-border transfers of prisoners across the EU. In the execution State, a prisoner could face a twofold scenario: material detention conditions failing to reach appropriate legal standards established by national law, or national rules either failing to define – entirely or partially – such standards or being too vague to meet the necessary requirements of accessibility and foreseeability.

It follows that the assessment made by the issuing authority pursuant to Article 4(2) of Framework Decision 2008/909/JHA should encompass all relevant circumstances regarding the prison treatment the sentenced person will receive, ranging from – in particular – the availability of rehabilitation

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[45] Grabenwarter 2014, p. 60, and case law referred to therein.

[46] According to the ECtHR, lawful detention must be carried out in good faith, be enforced in appropriate places of detention and conditions, connected to specific grounds for detention, and be of a reasonable duration in relation to the aim it pursues. *See* L. Mancano, 'The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters', *Cambridge Yearbook of European Law*, Vol. 18, 2016, p. 215.

[47] Judgment of 15 March 2017 in *Case C-528/15*, *Salah Al Chodor and Others*, ECLI:EU:C:2017:213.

programmes and of adequate contacts with family members, to the material conditions of detention in light of the situation of the person concerned (mental and physical health, age, etc.). For this purpose, the issuing authority is entitled – and in principle should be expected – to solicit information from the executing one. Should the latter fail to provide appropriate indications on the post-transfer situation of the transferee – including updated information on personal ties, the facility to which he or she will be sent, the rehabilitation programmes available therein, and the material detention conditions – the issuing authority should carefully consider prioritising the protection of the individual and the *intentio legis*.

Nonetheless, as the research conducted in the framework of the RePers project demonstrates, the judicial authorities face many difficulties in seriously addressing these preliminary assessments, due to workload and the lack of time and resources, to such an extent that on many occasions not a single piece of information is requested and subsequently made available. Often, in the three Member States involved in the project, requests for transfers are issued regardless of the absence of any indications as to the post-transfer regime to be faced by the person concerned. This unsatisfactory approach to the elusive notion of offenders' rehabilitation and to its assessment by the judicial authorities blurs the scope and content of the cooperation duties incumbent upon the issuing and executing Member States, as well as the purpose they should primarily pursue.[48] Even though they are crucial to the whole mechanism, the actual effectiveness of these preliminary instruments is highly questionable. Firstly, they rely entirely upon the (unilateral and generally very poor) commitment of the judicial authorities involved to prioritising social rehabilitation purposes. Secondly, the prisoner has very limited opportunities to contact the competent authorities, to support his or her position. Thirdly, as will be discussed in the next section, there are loopholes in effectively challenging a failure to perform the preliminary assessment pursuant to Article 4(2) before a domestic court, as it is just an interim stage of a more complex procedure, the formal outcome of which is the decision on recognition and execution issued abroad by the judicial authority of the executing Member State.

[48] Moreover, as discussed elsewhere, the clear dividing line between the complementary enforcement phases in the issuing and executing Member States – established by the Framework Decision and confirmed by the Court of Justice – further endangers the rationale of the transfer mechanism, as it disrupts ongoing rehabilitation programmes in which the prisoner might be involved in the issuing State. *See* S. Montaldo, 'Judicial Cooperation, Transfer of Prisoners and Offenders' Rehabilitation: No Fairy-Tale Bliss. Comment on Ognyanov', *European Papers*, Vol. 2, Issue 2, 2017, p. 709.

5.2. *Judicial Remedies, between National Procedural Autonomy and the Role of the Court of Justice*

In comparison to other judicial cooperation mechanisms, the way in which the Framework Decision implements the principle of mutual recognition is characterised by distinctive structural features. These differences are particularly striking in relation to the EAW, where the executing authority is expected to surrender the person concerned. In fact, the scope of the Framework Decision necessarily reverses the roles of the issuing and executing States: it is for the former to transfer the prisoner to the executing State, where he or she will serve the sentence. The Framework Decision connects the notion of executing authority to the material enforcement of the sentence abroad.

This paradigm shift has remarkable implications in terms of remedies to possible violations of fundamental rights and ensuing limits to the principle of mutual recognition.

A preliminary aspect must be highlighted in this respect. The Framework Decision provides no judicial remedies for resisting a forced transfer. More specifically, it does not introduce minimum common rules concerning the general features of an individual complaint against the cross-border enforcement of a sentence. Still, it might be the case that the recognition of a foreign decision results in a (risk of) violation of one of the rights outlined in the previous section, or that it does not serve the purpose of facilitating the prisoner's social rehabilitation. The absence of clear indications from the EU legislature is understandable, since it stems from both the vertical division of competence between the EU and the Member States and the principle of national procedural autonomy. Moreover, the Framework Decision covers a branch of criminal law in which the fragmentation of national legal orders reaches its peak, since *ius puniendi* – and the actual exercise of it – have always been considered a key component of core sovereign powers. In addition, as the Framework Decision is a former Third Pillar instrument entrusted solely to the decision-making power of the Council, one could hardly have expected more intrusive decisions to the detriment of the domestic reserved domains.

In this context, the structure of the cooperation mechanism at stake makes it rather difficult for the prisoner concerned to challenge a forced cross-border transfer. In fact, the decision on recognition and execution is entrusted to the State of destination, whereas the inmate is usually held in a prison facility in the issuing State. That decision formally closes the horizontal cooperation procedure and affects the prisoner's situation and legal regime. Therefore, an effective judicial complaint against a transfer should, in principle, challenge that domestic judicial decision, as occurs in relation to the EAW. However, in the latter case, the requested person is in the executing State and is necessarily assisted by a lawyer therein. This does not happen in cross-border transfers,

where, in most cases, the geographic divide and the ongoing detention of the person concerned converge and affect the possibility of resisting the decision on recognition easily and effectively.

Additional concerns stem from the opposite side of the horizontal cooperation procedure. In fact, the Framework Decision does not impose specific formalities for a transfer request submitted by the issuing authority. Therefore, it is the responsibility of the national legal orders and practices to better clarify this aspect of the procedure, which – nevertheless – has remarkable substantial implications on the person involved. The same applies to decisions denying a request for a transfer submitted by a prisoner. It follows that the transfer request (or the decision to reject a transfer) may take many different shapes and is in most cases issued by a public prosecutor without the intermediation or any sort of prior exequatur of a domestic court. The question, then, is whether the prisoner can challenge an intermediate judicial act barring or initiating a more complex cross-border procedure, which is closed by a final decision on recognition and enforcement issued in another Member State by the executing authority. Evidently, the question is particularly compelling in the event of *ex officio* requests issued in spite of the prisoner's dissent or rejected notwithstanding his or her consent to the transfer. Moreover, as discussed in the previous sections, the analysis of the practice shows that the preliminary check under Article 4(2) of the Framework Decision on whether the transfer would actually contribute to enhancing the prisoner's social rehabilitation often proves to be materially very difficult to implement for the authority involved. However, the broad discretion with which the issuing authorities are endowed is not apparently counterbalanced by clear remedies. The absence of indications in the Framework Decision and the aforementioned principle of procedural autonomy lead to the allocation of this aspect to the specific features of the domestic systems of judicial remedies and maximises the risk of loopholes. In fact, domestic legislations provide an extremely varied panorama. For instance, Spanish Law no. 23/2014 of 20 November, on mutual recognition of criminal decisions in the EU expressly envisages a judicial remedy against any decision to forward a request for cooperation to the judicial authorities of another Member State (Article 13). In other countries, such as Italy, The Netherlands and France, no such provisions are found. The possibility of challenging the request made by the public prosecutor is a disputed and – still not settled – practice, which can raise concerns as to the actual availability of this remedy.

Another key question is whether the case law developed by the Court of Justice (mainly) in the framework of the EAW can be extended to this separate area of judicial cooperation in criminal matters. In principle, as far as the interpretation of the grounds for refusal listed in EU legislation is concerned, there is no reason why a different regime should be reserved to cross-border transfers.

The answer is much more complex in relation to the *Aranyosi and Căldăraru* test, which covers all cases in which an exceptional situation may result in a serious and actual risk of violation of fundamental rights not envisaged in the list of pre-determined grounds for refusal.[49] In principle, the aforementioned twofold test could hardly be reiterated as such in cross-border transfers, since it would require the executing judicial authority to refuse recognition on the grounds of a negative self-assessment of the standards of protection of core fundamental rights in its own Member State. Even if a judicial authority were willing to perform such a self-assessment, the test would in any event be entirely modified: it would be confined to the realm of the executing State and no cross-border exchange of information and provision of assurances would logically apply. Crucially, we would then be dealing with a profoundly different test, the rationale of which would not be the establishment of exceptional limits to mutual trust and mutual recognition between the Member States but, rather, the empowerment of the domestic constitutional system for ensuring the compatibility of the national legal order with the standards set by the Charter. There would also be inevitable constitutional implications at domestic level, in terms of checks and balances between the judiciary and the executive and legislative branches of a Member State.[50]

In a nutshell, the *Aranyosi and Căldăraru* test – or what remains of it – would in any event forcefully undergo a genetic paradigm shift. It would be transformed from a horizontal inter-State dynamic of mutual warning on the protection of fundamental rights[51] to a purely domestic and unilateral scrutiny of the suitability of the national legal framework to respect this qualified EU *acquis* and the primacy and effectiveness of Union law. Nonetheless, from a

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[49] This is a cross-sectional issue which also applies to other judicial cooperation instruments, in particular those which are described as being complementary to Framework Decision 2008/909/JHA, namely Framework Decisions 2008/947/JHA of 27November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L 337, 16.12.2008, pp. 102-122) and 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, pp. 20-40). Some authors have already ruled out this possibility, but alternative tools - if not alternative approaches to the same test - should be sought, for the sake of the coherence of the judicial cooperation system within the EU. *See* T. Marguery, 'La confiance mutuelle sous pression dans le cadre du transfert des personnes condamnées au sein de l'Union européenne', *Eucrim*, Vol. 13, Issue 4, 2018, p. 185.

[50] From this point of view, it would be quite difficult to perform this check, as the executing judicial authority would have to acknowledge the existence of widespread challenges to fundamental rights within its own jurisdiction. Even though this would be precisely the role that one would expect an independent judicial scrutiny to play over public authorities, it must not be taken for granted that any judicial authority would be concretely willing and fully equipped to take on such a responsibility.

[51] I. Canor, 'My brother's keeper? Horizontal Solange: An Ever Closer Distrust Among the Peoples of Europe', *Common Market Law Review*, Vol. 50, Issue 2, 2013, p. 383.

substantive point of view, the judicial authority in the Member State of transfer could not obliterate the duty to protect fundamental rights when implementing EU law, set forth by Article 51(1) of the Charter and reiterated in the fundamental rights clause of Article 3(4) of Framework Decision 2008/909/JHA, which the Court of Justice used as a legal basis in Framework Decision 2002/584/JHA to establish the *Aranyosi and Căldăraru* test.

From this point of view, the Strasbourg case law and the evidentiary threshold proposed by the Court of Justice in its case law could be reliable reference points for this self-assessment, also because any diverging and stricter constitutional requirement would have to be considered through the lens of the *Melloni* doctrine.[52] This would also be in line with the urgent need for EU-wide coherence of the general approach to the limits on cross-border judicial cooperation mechanisms, irrespective of the solutions developed on an individual basis.

At the same time, from a political point of view, this assessment appears to be hardly conceivable, as the executing judicial authority would have to acknowledge the existence of widespread challenges to fundamental rights within its own jurisdiction. Firstly, even though this would be precisely the role that one would expect to be played by an independent judicial scrutiny over the risk of abuses on the part of the public authorities, it must not be taken for granted that any judicial authority would be concretely willing and fully equipped to take on such a responsibility. Secondly, this check would be likely to facilitate the lodging of (several) successful applications to the ECtHR against the Member State concerned.[53] These concerns could partially be overcome by resorting to the preliminary ruling procedure, as a way of *de facto* self-limiting the duty of mutual recognition through interpretative guidance centrally steered from Luxembourg. Again, however, the empowerment of Article 267 of the Treaty on the Functioning of the European Union as a tool for handling serious human rights concerns in the executing State reiterates the thorny issue of political feasibility outlined above. It should not be ruled out that the domestic judicial authorities might be prevented from referring to the CJEU, especially in those Member States where threats to the independence of the judiciary are fuelling the crisis of the rule of law. These hurdles might not affect all the Member States, but would still generate loopholes in the European system of protection of fundamental rights.

Be that as it may, any elaboration on the *Aranyosi and Căldăraru* test would have to address a third and final concern. It might be the case that a prisoner

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[52] *Case C-399/11*, *Stefano Melloni v. Ministerio Fiscal*.

[53] A. Rosanò, 'Clash of Titans: The Fight Against Impunity vs Social Rehabilitation and the Protection of Fundamental Rights in the Framework of the Transfer of Prisoners in the EU', in S. Montaldo & L. Marin (Eds), *The Fight Against Impunity in EU Law*, Hart Publishing, Oxford, forthcoming (May 2020).

faces the threat of unlawful detention conditions – either poor material standards or vague/absent legal standards resulting in arbitrary detention – which does not reach the threshold of the exceptional circumstances rebutting the presumption of mutual trust and allowing for a deviation from the duty of recognising and enforcing a foreign judicial decision, in light of the current developments of CJEU case law. The CJEU, in *LM*, although referring to exceptional situations justifying a fundamental rights limit to mutual recognition, contended that the availability of a remedy for challenging detention conditions does not suffice to rule out the risk of inhumane and degrading treatment. In fact, the crucial point is that no judicial cooperation mechanism should lead to a manifest violation of a fundamental right, *a fortiori* in the event of ones that cannot be derogated, as is the case for Article 4 of the Charter. This is even more compelling for cross-border transfers, which are inherently connected to the enforcement of sentences and custodial measures. However, neither the Framework Decision nor the Court of Justice have developed clear alternatives to existing remedies and tests, such that criticism has been raised with regard to a gap in protection within the mechanism of cross-border transfers and in the EU system of protection of fundamental rights as a whole. [54]

6. *Concluding Remarks*

Framework Decision 2008/909/JHA is not immune from the recurring dilemma of effectiveness versus fundamental rights protection, which characterises judicial cooperation mechanisms. On the one hand, this instrument facilitates the enforcement of a sentence or a custodial measure abroad, by minimising the formalities and providing for an expedited and purely judicial procedure. On the other hand, it raises several fundamental rights challenges, which are at the core of the rehabilitation goal pursued by this instrument. While cross-border transfers should be used to facilitate social reinsertion in a post-release era, thereby also preventing recidivism, the current practice reveals recurring attempts to use this judicial cooperation tool to dispose of undesired EU citizens or to deflate national prison systems and to lower budgetary burdens accordingly.

This trend is likely to result in illegitimate forced transfers that could undermine prisoners' rights, such as the right to family life, the right to liberty, and the prohibition on inhumane and degrading treatment. The Framework Decision maximises the role of the judicial authorities involved, which are both expected to perform a preliminary check on the implications of a cross-border transfer on

[54] *Cf.* Mancano 2019, p. 82.

the sentenced person. In principle, if these assessments reveal that the removal would not be beneficial to the inmate's progression towards social rehabilitation, the judicial cooperation mechanism should be set aside.

In this context, as is the case for any judicial cooperation instrument involving the exercise of public coercive powers, the set of remedies for resisting a forced transfer are revealed to be a much-needed pillar of the mechanism at issue. However, the current state of the art regarding available judicial remedies for fundamental rights violations resulting from forced cross-border transfers is a matter of concern. Generally speaking, the Framework Decision does not adopt minimum common standards in its domain. Judicial protection at domestic level broadly depends on national criminal procedural law and appears to be undermined by the lack of remedies in the issuing State and the need to challenge the decision on recognition from abroad. Moreover, even from the perspective of the executing State, the recent advances made by the Court of Justice fall short of securing appropriate protection, even in the case of exceptional situations stemming from systemic deficiencies. The *Aranyosi and Căldăraru* test does not apply, as such, to Framework Decision 2008/909/JHA transfers, and a specific test not yet been developed in relation to the risk of transferring prisoners to a facility where detention conditions are poor.

Two factors emerge from this context. Firstly, the magnitude of the competent judicial authorities' role and tasks is further amplified, since the presence of loopholes in the system of judicial remedies calls for appropriate *ex ante* safeguards with a view to preventing the risk of fundamental rights violations. Secondly, in a sort of inextricable circle, it highlights the need to strengthen the web of judicial protection pursuant to national law, as well as the need for clearer interpretative guidance from the CJEU.